A

PP

v.

GOBINATH ALFONSO A KUPPUSAMY

B

HIGH COURT MALAYA, ALOR STAR
ZAMANI RAHIM JC
[CRIMINAL TRIAL NO: 45-17-2006]
17 DECEMBER 2008

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Trafficking and possession - Whether proved - Drugs found underneath wooden cupboard in front bedroom - Presumption of knowledge under s. 37(g) DDA 1952 - Whether could be fastened onto accused - Whether accused exclusive occupier of front bedroom or there was possibility of access by others -*
D *Prima facie case - Whether established against accused on first and second charge - Dangerous Drugs Act 1952, ss. 6, 12(2), (3), 39A(1), 39(B)(1)(a), 2*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Trafficking and*
E *possession - Allegation of - Drugs found in inner trousers of accused - Physical possession - Whether proved - Prima facie case - Whether made out against accused - Plea of guilty - Sentence of five years imprisonment - Dangerous Drugs Act 1952, ss. 6, 12(2), (3), 39A(1), 39(B)(1)(a), 2*

F The accused was charged with three counts of charges which were (i) trafficking in 53.79 grams of methamphetamine, an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 punishable under s. 39B(2) Dangerous Drugs Act 1952 (first charge P2A)(ii) in possession of 40.49 grams of cannabis an offence under s. 6
G Dangerous Drugs Act 1952 punishable under s. 39A(1) Dangerous Drugs Act 1952 (second charge P2B) and (iii) in possession 0.10 grams of heroin and 0.13 grams of monoacethymorphines an offence under s. 12(2) Dangerous Drugs Act 1952 punishable under s. 12(3) Dangerous Drugs Act 1952. Briefly, the facts were
H that on 29 April 2005, at about 12.15am, a police party led by SP4 raided a flat where three male Indians were seated in the living room. One of them was identified as the accused and the other two were one R Kayampu a/l Rathinam and one Tan Hock Jin. SP4, after identifying himself as a police officer, proceeded to
I the front bedroom, and underneath a wooden cupboard found a plastic file casing. He examined the said plastic file casing in the presence of the accused and the two Indians and found

substances suspected to be dangerous drugs, a Restricted Malaysian Passport and an OCBC Bank passbook in the name of the accused. The body of the accused and the other two Indians were searched. A plastic packet containing powdery substance suspected to be heroin was found in the inner trousers at the buttock worn by the accused. All the exhibits were seized and the accused along with the other two Indians were arrested. The drugs exhibits were subsequently examined and analysed by the government chemist, SP3, and the result of the analysis were (i) five plastic packets containing granular substances were methamphetamine weighing 53.79 grammes; (ii) a small compressed slab of dried leaves weighing 18.65 grammes of cannabis; (iii) 40.49 grammes of cannabis; (iii) a plastic packet containing granular brownish substances weighing 0.10 grammes of heroine and 0.13 grammes of monoacetylmorphines; (iv) two bottles containing 185 milileters of dark brownish liquid weighing 0.04 grammes of codeine. At the close of the prosecution case, the issue was to determine whether the prosecution had established a *prima facie* case against the accused.

Held (acquitting and discharging accused of first and second charge; accused guilty of third charge):

(1) The prosecution is required to prove that the accused was in possession of the drugs, the subject matter of the charge. The drugs found underneath the wooden cupboard in the front bedroom were the subject matter of the first and second charges. No direct evidence, voluntary confession or reasonable inference might be drawn that the accused had knowledge of the said drugs under the cupboard. There was also no evidence that the front bedroom was locked, and was not accessible by anyone other than the accused. At the time of the police raid, R Kayampu and Tan Hock Jin were present and seated together with the accused in the living room. They were friends of the accused. The possibility of access by others especially R Kayampu and Tan Hock Jin to the said bedroom could not be ruled out. Though the drugs were concealed, and the accused passport and OCBC bank book were found together with the drugs in the same plastic file casing, presumption of knowledge under s. 37(g) could not be fastened onto the accused as there was no evidence that he was an exclusive occupier of the said front bedroom or premises. However, a plastic packet containing granular brownish substance was found in the inner trousers at the buttock worn by the accused. As stated earlier, upon analysis

A by the government chemist, the said substance was confirmed to be a mixture of 0.10 grammes of heroine and 0.13 grammes of monoacetylmorphines. It was the subject matter of the third charge. The accused was in physical possession of the said mixture of drugs. (paras 13 & 15)

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(2) Upon maximum evaluation of the prosecution evidence, the prosecution had failed to establish a *prima facie* case against the accused on the first and second charge, P2A and P2B respectively. The accused was therefore acquitted and

C discharged thereof. However, the prosecution had made out a *prima facie* case against the accused in respect of the third charge, P2C. He was called to make his defence. He elected to change his plea to one of guilty to the third charge, P2C. Having heard his mitigation, the court sentenced him to five years

D imprisonment from the date of his arrest. (paras 28 & 29)

[Order accordingly.]

Case(s) referred to:

Abdullah Zawawi Yusof v. PP [1993] 4 CLJ 1 SC ***(refd)***

E *Lee Chee Meng v. Public Prosecutor [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168 SC* ***(refd)***

Low Geok Yeok v. PP [1982] CLJ 38; [1982] CLJ (Rep) 539 HC ***(refd)***

Mah Hong Ching & Anor v. PP [2007] 2 CLJ 292 CA ***(refd)***

PP v. Chee Kon Fatt [1991] 3 CLJ 2564; [1991] 3 CLJ (Rep) 513 HC ***(refd)***

F *PP v. Chia Leong Foo [2000] 4 CLJ 649 HC* ***(refd)***

PP v. Chong Wei Kian [1990] 2 CLJ 435; [1990] 2 CLJ (Rep) 690 HC ***(refd)***

PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***

PP v. Ong Cheng Heong [1998] 4 CLJ 209 HC ***(refd)***

G *PP v. Yap Hai Ling [1990] 1 CLJ 983; [1990] 2 CLJ (Rep) 909 HC* ***(refd)***

Saludin Surif v. PP [1997] 3 CLJ 529 CA ***(refd)***

Seneviratne v. R [1936] 3 All ER 49 ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 179

H Dangerous Drugs Act 1952, ss. 2, 37(b), (g)

Evidence Act 1950, s. 114(g)

Other source(s) referred to:

Halbury's Laws of England, 4th edn, vol 37, para 513

I *For the appellant - Ridha Abdah Subri DPP*

For the respondent - RSN Rayer

Reported by Suhainah Wahiduddin

JUDGMENT

Zamani Rahim JC:

The Charges

[1] The accused was charged with three counts of charges, P2A, P2B and P2C as follows:

a) First Charge, P2A

> Bahawa kamu pada 29.04.2005, jam lebih kurang 12.30 tengah malam di rumah No. 14, Tingkat 1, Blok C, Taman Jati, di dalam Daerah Kulim dalam Negeri Kedah Darul Aman, telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 53.79 gram. Oleh yang demikian, kamu telah melakukan kesalahan dibawah s. 39B(1)(a) ADB 1952 yang boleh dihukum dibawah s. 39B(2) ADB 1952.

b) Second Charge, P2B

> Bahawa kamu pada 29.04.2005, jam lebih kurang 12.30 tengah malam di rumah No. 14 Tingkat 1, Blok C, Taman Jati di dalam Daerah Kulim, dalam Negeri Kedah Darul Aman, telah didapati memiliki dadah berbahaya iaitu cannabis seberat 40.49 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah s. 6 ADB 1952 yang boleh dihukum dibawah s. 39A(1) ADB 1952.

c) Third Charge, P2C

> Bahawa kamu pada 29.04.2005, jam lebih kurang 12.30 tengah malam di rumah No. 14, Tingkat 1, Blok C, Taman Jati, di dalam Daerah Kulim, dalam Negeri Kedah Darul Aman, telah didapati memiliki dadah berbahaya seberat 0.23 gram iaitu 0.10 gram heroin dan 0.13 gram Monoacethymorphines. Oleh yang demikian, kamu telah melakukan satu kesalahan dibawah s. 12(2) ADB 1952 yang boleh dihukum dibawah s. 12(3) ADB 1952.

[2] At the close of the prosecution case, my task is to determine whether the prosecution has established a *prima facie* case against the accused. In so determined, I am guided by the following steps summarised in the Federal Court case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 at p. 467:

> (i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that

A may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

(ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I
B prepared to convict him on the evidence now before me? If the answer to that question is "Yes", then a *prima facie* case has been made out and the defence should be called. If the answer is "No" then, a *prima facie* case has not been made out and the accused should be acquitted;

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(iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. Public Prosecutor*
D [1963] 1 LNS 82; [1963] MLJ 263.

Facts Of Case

[3] Now the facts. On 29 April 2005, at about 12.15am, a police party consisting of eight personnels, led by C/Insp. Hasan
E bin Mohamad Salih @ Mohd. Salleh, SP4 raided a flat No. 14, Tingkat 1, Blok C, Flat Taman Jati, Kulim.

[4] On arrival at the said premises, SP4 found its front door and grille were not locked. He and two of his men entered the
F premises. He saw three male Indians were seated in the living room. One of them subsequently identified as Gobinath Alfonso (accused) and the other two were R. Kayampu a/l Rathinam and Tan Hock Jin, a mixed race of Indian and Chinese descent.

G **[5]** SP4 identified himself as a police officer. He proceeded to search the premises. In the front bedroom, marked 'BTH' in the sketch plan, P21, there was a wooden cupboard. Two of his men lifted the cupboard. Underneath the cupboard on the floor, he found a plastic file casing written with the words "document file".
H He examined the said plastic file casing in the presence of the accused and the two Indians. He found as follows:

1) Five plastic packets containing granular substances suspected to be syabu.

I 2) i) a compressed slab of dried leaves suspected to be ganja;

ii) a plastic packet containing a small slab of compressed dried leaves suspected to be ganja;

iii) a mixture of dried compressed slab and dried leaves in powder form suspected to be ganja.

3) an advertisement paper package entitled "Promotion" containing loose dried leaves suspected to be ganja.

4) a Restricted Malaysian Passport in the name of the accused.

5) an OCBC Bank passbook in the name of the accused.

6) a weighing scale of 'pocket scale' brand.

7) Two plastic bottles containing dark brownish liquid of codeine weighing 0.04 grammes.

[6] The other two rooms marked BIT and BTB in the sketch plan, P21 were also searched. Nothing incriminating was found therein.

[7] The body of the accused, R. Kayampu and Tan Hock Jin were searched but nothing incriminating was found on them. However, a plastic packet containing powdery substance suspected to be heroin was found in the inner trousers at the buttock worn by the accused.

[8] All the exhibits were seized by SP4. The accused, R. Kayampu and Tan Hock Jin were arrested. They were escorted to Kulim District Police Headquarters where a separate search list each for the accused, R. Kayampu and Tan Hock Jin were prepared by SP4. They were produced and marked P22, P23 and P24 respectively.

[9] On 30 April 2005, at about 12 noon, all the exhibits and the arrested persons were handed over by SP4 to the investigating officer, C/Insp. Mohamad Fazil, SP5. As part of the investigation, photographs were taken.

[10] The drugs exhibits were subsequently examined and analysed by the government chemist, SP3 and the result of the analysis wereas follows:

a) Five plastic packets marked "S1 to S5" containing granular substances were methamphetamine weighing 53.79 grammes.

b) i) a small compressed slab of dried leaves weighing 18.65 grammes of cannabis.

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ii) a mixture of dried plant materials weighing 3.60 grammes of cannabis.

iii) a plastic packet marked "K1" containing a small slab of compressed dried leaves weighing 18.24 grammes of cannabis.

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The total weight of cannabis was 40.49 grammes.

c) A packet plastic containing granular brownish substances weighing 0.10 grammes of heroine and 0.13 grammes of monoacetylmorphines.

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d) A plastic bag with 2 plastic bottles in it marked P1 and P2. The two bottles contained 185 milliliters of dark brownish liquid weighing 0.04 grammes of codeine.

D

e) A weighing scale with its cover which was free from any traces of drugs.

Methamphetamine, heroine, monoacetylmorphines and codeine are listed in the First Schedule of Dangerous Drugs Act 1952. "Cannabis" is defined in s. 2 of Dangerous Drugs Act 1952.

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Possession In Law

[11] Now the law. The prosecution is required to prove that the accused was in possession of the drugs, the subject matter of the charge. In the case of *PP v. Ong Cheng Heong* [1998] 4 CLJ 209, Vincent Ng J said:

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> Possession – through having control and custody – in order to incriminate a person, must be such that the possessor must know the nature of the thing possessed: see *PP v. Kau Joo Huat* [1988] 1 CLJ 477; [1988] 1 CLJ (Rep) 258; *Choo Teck Soon v. PP* [1953] 1 LNS 16 and *PP v. Basri bin Salihin* [1993] 1 CLJ 420. Having exclusive custody and control implies and involves having knowledge both of the drugs and the nature thereof: see *Ho Seng Seng v. R* [1951] 1 LNS 25 and *PP v. Kang Ho Soh* [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557. And for the purpose of criminal liability, without exclusive custody and control of the drugs, the mere fact that the accused had knowledge thereof is insufficient to incriminate: see *PP v. Basri bin Salihin, supra*, *PP v. Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576; *Choo Yoke Choy v. PP* [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43; *PP v. Lai Ah Bee* [1974] 1 LNS 119; *Yee Ya Mang v. PP* [1971] 1 LNS 156; *PP v. Khoo Boo Hock & Anor* [1990] 1 CLJ 971; [1990] 2 CLJ (Rep) 716; *PP v. Kau Joo Huat, supra* and *PP v. Mohd Fairus bin Omar* [1998] 5 MLJ 729.

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[12] His Lordship went on to say at p. 231 as follows: A

> Incidentally – also on the question of exclusivity – it has decided in *Lee Chee Meng v. PP* [1992] 1 MLJ 322 that to be an 'occupier' of the room or premises within the meaning of s. 37, the accused must have exclusive occupation or exclusive use and care or management of the room or premises where the offending exhibit is found (see also *PP v. Aris bin Yunus* [1989] 1 CLJ 239; [1989] 2 CLJ (Rep) 289 and *R v. Abbott* [1955] 2 All ER 899 – where two people were jointly indicted and evidence did not point to one rather than the other, and there was no evidence that they were acting in concert. And occupation is presumed on proof of care or management and control – but it has to be exclusive occupation: see *PP v. Yap Hai Ling* [1990] 1 CLJ 983; [1990] 2 CLJ (Rep) 909. B C

Drugs Found Underneath The Wooden Cupboard In The Front Bedroom D

[13] The drugs found underneath the wooden cupboard in the front bedroom were the subject matter of the first and second charges. No direct evidence, voluntary confession or reasonable inference might be drawn that the accused had knowledge of the said drugs under the cupboard. There was also no evidence that the front bedroom was locked, and was not accessible by anyone other than the accused. At the time of the police raid, R. Kayampu and Tan Hock Jin were present and seated together with the accused in the living room. They were the accused friends. The possibility of access by others especially R. Kayampu and Tan Hock Jin to the said bedroom could not be ruled out. In the Supreme Court case of *Abdullah Zawawi Yusof v. PP* [1993] 4 CLJ 1, Edgar Joseph SCJ said: E F G

> ... The onus was not on the defence to possibility of access by others but on the prosecution to exclude such possibility. Of course, the defence could besides taking advantage of infirmities in the prosecution case in this regard, have gone further, and shown the possibility of access by others, but this they were not, in law, obliged to do. H

[14] See also the Court of Appeal case of *Saludin Surif v. PP* [1997] 3 CLJ 529.

[15] I am not unmindful that the accused passport and OCBC bank book were found together with the drugs in the same plastic file casing. Though the drugs were concealed, presumption of knowledge under s. 37(g) could not be fastened onto the accused I

as there was no evidence that he was an exclusive occupier of the said front bedroom or premises. In *PP v. Chong Wei Kian* [1990] 2 CLJ 435; [1990] 2 CLJ (Rep) 690, James Foong J of the view that the prosecution had failed to adduce sufficient evidence to activate the presumption under s. 37(b). His Lordship said:

> Section 37(b) requires evidence to show that the accused was an occupier of room X or had or appeared to have had the care and management of the said room. The mere presence of the keys obtained from his pocket, the passport and the bank book bearing his name found therein are insufficient evidence to activate this presumption without further evidence being adduced by the prosecution.

[16] In *Chong Wei Kian*'s case *(supra)* the learned deputy also argued that the presumption in s. 37(g) had been raised against the accused but His Lordship disagreed and said:

> Before this presumption (ie, s. 37(g)) can be activated there must be evidence of exclusive occupation to make the accused an occupier. In this case there is no evidence proved beyond reasonable doubt of this fact.

[17] In the same vein in the case of *Low Geok Yeok v. PP* [1982] CLJ 38; [1982] CLJ (Rep) 539 Gunn Chit Tuan J said:

> There was no evidence that the appellant was in exclusive occupation of the kitchen where the two stoves were found and therefore he would not be held to be the occupier of it (*Lim Say Hun v. PP* and *PP v. Lai Ah Bee*).

[18] And also in the case of *PP v. Yap Hai Ling* [1990] 1 CLJ 983; [1990] 2 CLJ (Rep) 909, Wan Yahya bin Pawan Teh J said:

> It is trite law that before the presumption of knowledge under s. 37(g) can be activated, the prosecution must prove that the accused was the occupier of the premises and occupation is presumed on proof of management and control. The term occupier in the context of these presumption must mean the person having exclusive occupation of the premises and premises must include the actual part of the premises in which the drug was found.

See also the Federal Court case of *Lee Chee Meng v. PP* [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168.

[19] Be that as it may, there are three material witnesses that were not called by the prosecution, namely, R. Kayampu, Tan Hock Jin and the accused father. The learned deputy in his opening speech said that he would be calling two civilians as prosecution witnesses who were present in the premises at the time of the police raid. Though not in so many words, these two civilian witnesses were definitely referred to the said R. Kayampu and Tan Hock Jin.

[20] The opening speech is presumably made pursuant to s. 179 of the Criminal Procedure Code. It is a very formal and delivered in the course of criminal proceedings. The *Halbury's Laws of England,* 4th edn, vol 37 para 513 says "The opening of the case in an occasion of crucial importance and needs to be prepared and presented with great care, skill and deliberation". Thus, the opening statement must be made with utmost care and its importance cannot be underestimated.

[21] It is a well-established practice that the opening statement is required to be presented before the commencement of the trial as it would serve as a beacon paving precisely the direction of the prosecution case to assist both the trial judge and the defence. From the defence standpoint, the learned counsel may then narrow down his cross examination along appropriate lines and thus avoiding a waste of the court's time. The importance of the prosecution delivering the exact nature of its case against the accused was emphasised in *Mohd Radzi bin Abu Bakar, supra* and reiterated in the Court of Appeal case of *Mah Hong Ching & Anor v. PP* [2007] 2 CLJ 292.

[22] Reverting back to these two witnesses R. Kayampu and Tan Hock Jin, I do not entertain any slightest doubt that they are material witnesses who may shed light, *inter alia*, whether the accused was the sole occupant of the said premises; whether they were also occupants or visitors of the said premises; whether the drugs found in the plastic file casing underneath the cupboard were theirs or they had custody and control over them; whether the accused passport and OCBC bank book were indeed found together with the drugs in the plastic file casing and also who had kept the drugs in the said plastic file casing. In other words, the evidence of R. Kayampu and Tan Hock Jin may enlighten on the issue of exclusivity of possession of the drugs that were recovered underneath the cupboard in the front bedroom marked BTH in the sketch plan, P21.

[23] Regarding the need to call essential witnesses to unfold the prosecution case, Edgar Joseph J (as he then was) in *PP v. Chee Kon Fatt* [1991] 3 CLJ 2564; [1991] 3 CLJ (Rep) 513 had referred to Lord Roche's reminder in a Privy Council case from Ceylon (now Sri Lanka) *Seneviratne v. R* [1936] 3 All ER 49 as follows:

> Witnesses essential to the unfolding of the narrative upon which the prosecution case is based must of course, be called by the prosecution whether in the result the effect of their testimony is for or against the prosecution. (emphasis added)

[24] At the close of the prosecution case, R. Kayampu and Tan Hock Jin were merely offered to the defence. Contrary to the court expectation and perhaps to the relief of the defence, they were not called to give evidence. The learned deputy had made a roundabout turn for failing to call them. The learned deputy had reneged from what he said in the opening speech that he would call these two witnesses to prove that the accused was in possession of the drugs exhibits. No explanation was given as to why he did not honour his words. The statement made in the course of the opening speech is made on occasion of crucial importance, much thought and deliberation must have been given to it. More so the statement relates to the root of the trafficking charge, that is, possession. Therefore, if R. Kayampu and Tan Hock Jin had been called their evidence would be unfavourable to the prosecution. Offering them in the circumstances of this case, would not prevent an adverse inference under s. 114(g) from being activated as they were essential witnesses at least on the issue of accessibility to or exclusivity of the said front bedroom. In *PP v. Chia Leong Foo* [2000] 4 CLJ 649, Augustine Paul J (as he then was) said at p. 674 as follows:

> Where the evidence of a witness is material he must be called to testify. Offering him to the defence, in such circumstances, will not prevent an adverse inference being drawn.

[25] As regard the accused father, he was not offered to the defence at all. His evidence is no doubt essential. Being the owner of the said premises, if called, he can possibly be able to say who is the occupier or occupiers of the said premises and who keep the keys to the said premises, in particular the keys, if any, to the said front bedroom where the drugs were found.

Drugs Found In The Accused Trousers

[26] A plastic packet containing granular brownish substance was found in the inner trousers at the buttock worn by the accused. As stated earlier, upon analysis by the government chemist, the said substance was confirmed to be a mixture of 0.10 grammes of heroine and 0.13 grammes of monoacetylmorphines. It is the subject matter of the third charge.

[27] It is clear that the accused was in physical possession of the said mixture of drugs.

Conclusion

[28] Upon maximum evaluation of the prosecution evidence as pointed above, the prosecution has failed to establish a *prima facie* case against the accused on the first and second charge, P2A and P2B respectively. The accused was therefore acquitted and discharged thereof.

[29] However, the prosecution has made out a *prima facie* case against the accused in respect of the third charge, P2C. He was called to make his defence. The three alternatives were explained to the accused to state his defence. He elected to change his plea to one of guilty to the third charge, P2C. Having heard his mitigation, I sentenced him to five years imprisonment from the date of his arrest on 29 April 2005.